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ABSTRACT

The regulation of the college merger process in New York, including its effects on a recent merger between private institutions, is examined. New York's higher education policy formation process and the laws and policies that make college mergers possible are considered. The merger of Eisenhower College and Rochester Institute of Technology provides a reference for specific recommendations to enhance the merger option and use it for controlled retrenchment within the system. Two common routes for colleges seeking mergers in New York State are the traditional consolidation of two or more institutions into one and a form using laws designed for institutional closure to dissolve one institution and transfer its assets to another. The dissolution merger of independent institutions could be the type most frequently practiced in coming years, and it is the type illustrated by the merger of Eisenhower College and Rochester Institute. The dissolution/acquisition route is not favorable to the dissolving institution but it can provide continuity for current students and their records and may provide, in part, employment for faculty and staff, perpetuation of some goals and traditions, and continued debt service supporting the dormitory bonds. There are seven distinct policies and practices that may impinge upon a college merger before, during, and after its consummation. Five apply to all mergers and the remaining two involve special cases: monitoring, off-campus instruction, chartering, master planning, program registration, legislative override, and trustee replacement. The time involved to phase out older academic programs and initiate new ones is discussed. It is recommended that New York should continue its policy of not requiring formal notice to the state mergers, should develop merger experts who can broker mergers, provide policy information, and negotiate the process. A bibliography is appended. (SW)

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SOUTHERN REGIONAL EDUCATION BOARD

This case study by Gail S. Chambers was commissioned by the Southern

**PRIVATE COLLEGE MERGERS AND STATE POLICY:
A CASE STUDY OF NEW YORK**

Gail S. Chambers

Regional Education Board. The study of the public policy issues associated with consolidation and financial distress in colleges and universities. For a complete report of this project, see the forthcoming publication: James R. Hinkle and Associates, Challenges of Consolidation: Strategies for Consolidating Programs, Cutting Costs, and Reallocation Resources (San Francisco: Jossey-Bass). Readers are referred also to the two other cases dealing with "State Policy and Private College Mergers," published by ERBE: "State Policy and Private Higher Education in Tennessee," by E. Grady Rogers, and "Maintaining a Private College Tradition: The State of Virginia," by Gail S. Chambers. A case study of public colleges in Virginia, by Richard J. Hestinger, Jr. Funds for these studies were provided in part by the Ford Foundation.

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Gail Chambers is a Ph.D. candidate at the University of Rochester. \$3.00

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*Gail Chambers is a Ph.D. candidate at the University of Rochester.

College merger can provide a creative and relatively incremental means for reducing a system of higher education to match diminished demand. In comparing it to other options available to financially distressed institutions, most states will want to encourage merger between independently supported schools as well as among those supported by the state. There is little common knowledge on how to do so, however, and each state's approach will depend on its own laws and regulatory climate. Because New York has one of the more closely regulated systems of higher education (George Washington University Institute for Educational Leadership, 1975), the effects of its particular governance structure and policies can serve as a point of reference for states deliberating over statewide coordination and control of the retrenchment process. To provide such a reference point, this paper examines in detail regulation of the merger process in New York, including its effects on a recent merger between private institutions, and examines its implications for statewide retrenchment. It characterizes New York's higher education policy setting, then examines the laws and policies which make college merger possible. A section on the merger of Eisenhower College with Rochester Institute of Technology provides background for specific recommendations to enhance the merger option and use it for controlled retrenchment within the system.

Note: This paper has benefited from the advice of policy analysts and education faculty at the University of Rochester, as well as from the contributions of state and institutional officials. Any errors or misinterpretations belong solely to the author.

THE NEW YORK POLICY SETTING

Governance of higher education in New York State is complicated by the sheer size and diversity of the system. It consists of four large sectors-- 135 independent colleges and universities, 27 proprietary schools (omitted from this study due to great differences in statutes and regulations which apply to this sector in New York and elsewhere), the 64-unit State University of New York (SUNY), and the 18-unit City University of New York (CUNY). Despite a history of competition among the sectors, the Regents of the University of the State of New York attempt to manage them as a single educational delivery system through statewide master planning, regional planning, and program registration.

New York's Regents are established by state constitution as the supreme board over all educational undertakings in the state: public and private, preschool through professional. As such, they and their 3,000-member administrative arm, the State Education Department (SED), are responsible for the promulgation, execution, and adjudication of a body of administrative law covering all aspects of education in the state. Their authority seems sweeping, but is bound by both law and custom. Most importantly, the Regents have no power of the purse; their role in the state's appropriation process is limited to making annual recommendations. There is also a constant possibility that the legislature will undo the Regents' plans, since their constitutional authority exists only "as modified by the legislature" (New York State Constitution of 1938, Article XI, §2). Examples of such "modification" include statutory dismissal of trustees (Smith v. Jansen, 85 Misc 2d 81 [1975]); moratoria on system reorganization (CUNY in 1976 Session Laws, Chapter 345,

§8b) or retrenchment (SUNY in Chapter 112, Laws of 1980); and a history of ad hoc grants to private colleges. The Regents do not debate the legality of such legislation, but point out that it makes managing the overall system more difficult. Regents' authority is also bounded on the downward side, albeit weakly. In dicta, the state's highest court has cautioned them from interfering in the day-to-day activities of institutions (Moore v. Board of Regents, 44 NY2d 593). To operate effectively within these constraints, the Regents have developed a stance toward the higher education community characterized by close observation, coordination, and quality control, combined with an arm's length approach to institutional affairs.

The precise boundaries of Regents' responsibility are so unclear that they are frequently debated with the institutions and the legislature. With institutions, this is generally a consultative process. In cases of vital interest, however, Regents' authority has been forcefully and successfully argued in the courts (see Moore). It has been somewhat more difficult for the Regents to press their case with the legislature, but the legislature does seem to favor letting the Regents handle nonfiscal matters according to their expertise.

The results reached by this balance of authority frequently depend upon political factors. The Regents themselves are politically insulated. They are elected by the legislature for seven-year terms with the expectation that they will have informational ties to their respective districts but will serve a statewide constituency. The governor and the legislature, of course, are sensitive to the needs of specific communities and of statewide political blocs in ways that can affect educational policy. For example, New York City

legislators can vote as a bloc to bring funds or services to the downstate urban districts. In addition, one of the most powerful statewide lobbies is that of the teachers' unions which represent, among other interests, the SUNY and CUNY faculties; virtually all recent increments in the public sector's budgets have been absorbed by these faculties through collective bargaining agreements (Kelly, 1979). The effects which such political clout can have on statewide retrenchment became clear in 1980 when the legislature unanimously overrode a governor's veto that would have brought budget cuts for the SUNY system, stipulating in the bill that there be no decrease in programs offered or in the level of service provided by that sector (Chapter 50, Laws of 1980, p. 196). Where the interests of these two major blocs intersect--in the CUNY system--policies are especially susceptible to political resolution.

The state's fiscal condition can also be a determining factor. Since New York City's financial crisis in 1975, New York has been particularly anxious to maintain faith in its fiscal practices. This poses a special problem in relation to enrollment decline. Much of the postwar building in the state's higher education system--public and private--was financed through bonds issued by the New York State Dormitory Authority and backed by assets (such as endowment in escrow, dormitories, and dining halls) and by cash reserves but not by the full faith and credit of the state. The credit thus created is sustained by large enrollments at the independent institutions and indirectly by the state's obligation to cover debt service for the public institutions (Regents of the State of New York, 1975). Large-scale default due to enrollment declines in the independent sector could hurt the financial institutions holding these bonds, and create moral and practical obligations to back them. On the other

hand, large-scale enrollment losses in the public sector could create an additional net burden on the treasury. Thus, the fiscal interests of the state are tied to the problems of enrollment decline, regardless of how these are distributed within the system. Pressures to maintain the fiscal structure could lead to an ad hoc approach in the future as individual institutions face default.

These are realities which constrain New York's higher education retrenchment policy. The facts which drive it, however, include an expectation that enrollment decline will be unusually heavy in New York. Planners in the State Education Department anticipate a one-third drop in statewide enrollments by 1990 if there are no intervening changes in public policy. In all likelihood a large number of independent institutions in New York will cease to exist by 1990. Most vulnerable are those institutions which have already experienced declines and for which further decline is anticipated; it is unlikely that they will have enough fiscal leverage left to survive (Regents of the State of New York, 1975).

Shrinkage of the magnitude anticipated for New York--if it occurs--clearly will not be absorbed by incremental changes in existing institutions but will require some broader strategy. Realizing this, in 1977 the Regents adopted procedures for monitoring institutional health, for consulting with those experiencing fiscal difficulties, and for suggesting resolutions which might include state grants or loans, "state related status," interinstitutional contracts, mergers, and closings (State Education Department, 1977). Through this and related policies, the Regents seem to be moving toward an overall retrenchment strategy based on the free-market tradition of economics. Under

such a market theory, pressures of perfect market competition drive out only the least efficient units. Elements of Regents' policy which indicate this approach include efforts to:

- Narrow the public/private tuition gap by strengthening a program of student-carried state assistance (the Tuition Assistance Plan--TAP), funded at \$243 million in 1980.
- Increase per-capita institutional aid to private colleges (the "Bundy" money), funded at \$35 million in 1980.
- Keep competition fair through regional master planning and the regulation of off-campus instructional programs.
- Encourage the vitality of all institutions through even-handed monitoring and consultation.
- Protect students from the undesirable effects of competition by eliminating weak programs.
- Encourage flexibility and variety when these are backed by sound educational planning.

The success of such a policy depends on the purity of the market and on whether or not buyers possess the kind of "perfect" knowledge and mobility needed to purchase in aggregate the best set of programs. It is doubtful that the market for higher education in New York State can be made to approximate these conditions. Experiments elsewhere with voucher funding systems attempt to address the problem of a pure market; the form of student-carried aid practiced in New York is a far less effective device. Limitations posed by the market's young or homebound buyers are even more intransigent, and Regents' efforts to improve this aspect of the market have also been frustrated;

despite strong recommendations by the State Education Department for public support, recent legislative budget cuts have eliminated a central admissions referral and information center (Regents of the State of New York, 1979). Under these conditions, the success of a market strategy can be incremental at best and therefore should be augmented with other approaches.

MERGER OPTIONS IN NEW YORK STATE

Not all of the state's policies are consonant with the Regents' apparent market approach, but current practice with respect to mergers fits such a strategy well. Merger represents one form of institutional closure plus a source of innovation to meet changing market needs. Under New York's education law, procedures for merging educational institutions are more definitive than they are in other states (Meyer, 1970). There are four possible routes for colleges seeking mergers in New York State: the traditional consolidation of two or more institutions into one; a form using laws designed for institutional closure, to dissolve one institution and transfer its assets to another; and two rare forms involving interlocking boards by voting the same trustees onto one another's boards or by contracting to make one board act as a holding company for the other. In general, consolidation implies somewhat balanced terms of agreement between the merging institutions, and an assumption by the successor institution of all the privileges and obligations of its parents. Once an agreement has been reached, such a merger can be accomplished by a single action of law. The dissolution route requires much more complicated legal action but has advantages for cases involving financial exigency. In form it resembles the type of corporate merger in which assets and liabilities are reviewed by the purchasing firm and are selectively acquired under separate

purchase agreements. This route allows an acquiring institution to negotiate for assets of a failing institution without undertaking full obligation for its students, faculty, or debts.

Combinations in practice under these options include dissolution mergers between independent institutions (as illustrated by the Eisenhower-Rochester Institute of Technology case); consolidation of independents (Institute for Advanced Study in the Humanities and the Jewish Theological Seminary); absorption of an independent into a public system (illustrated most recently by the merger of Voorhees Technical Institute into CUNY); the "federation" of two public institutions (College of Staten Island and Richmond College within the CUNY system); election of the board of the New School of Social Research to the trusteeship of the Parsons School of Design (Haines, 1980); and the creation of Colgate Rochester Bexley Hall-Crozer Divinity School as the holding corporation for a number of seminaries. Unusual combinations are also possible: New York's legislature once ordered consolidation of part of an independent school with another independent as a condition for emergency financing (New York University's School of Engineering with the Brooklyn Polytechnic Institute).

There are also two options not currently provided for by law which show promise in terms of custom and expediency. A viable but hard-pressed independent institution might find it desirable to negotiate "state-related" status through merger of one of its units into the public system. Such a merger might follow the model of New York's statutory colleges at Cornell, Syracuse, and Alfred, where state-desired units have been funded within independent institutions. Using this precedent, for example, a university

might negotiate for some socially vital but inordinately expensive unit--such as a medical center--to become a state college within the original institution. A second merger-related option is that of "de-merging" an institution from the public system. If faced with severe systemwide budget cuts, some public units with strong identities and alumni support might choose to stand alone. For instance, Hunter College in New York City might choose to reverse its merger with CUNY if that system once more found itself part of a citywide financial crisis.

The dissolution merger of independent institutions could be the type most frequently practiced in coming years, and it is the one illustrated by the case material which follows. The dissolution/acquisition route is not favorable to the dissolving institution but it can provide continuity for current students and their records. It may also provide in part for employment of faculty and staff, perpetuation of some goals and traditions, and, importantly, continued debt service supporting the dormitory bonds. In addition, given a fiscal climate more severe than that which now exists, large-scale consolidations within the two public systems might develop as a compromise form of retrenchment. For example, under policy similar to one proposed in Massachusetts ("Mergers of 4 Colleges Proposed in Mass.," 1981), a campus could be reclassified as a "branch" of one of the state's university centers or as an "extension center" or "extension site" guaranteed to service regional demand but free to consolidate underenrolled programs and to reduce administrative structure. New York's newly promulgated definitions for off-campus instructional units would provide quality control for such a policy. To be politically

feasible, however, such arrangements would have to gain support from local communities and, hence, probably would be impossible for locally controlled community colleges. In addition, faculty unions would have to support such plans, or legislative override could block the scheme, as it has blocked reorganization and retrenchment attempts in the past. There is one instance, though, in which a natural coalition exists encouraging mergers in the public sector. Under current funding formulas, CUNY units offering the associate degree receive less assistance from the state than do units offering baccalaureate degrees. By merging or reclassifying lower division colleges into upper division ones, the city can shift fiscal responsibility to the state. Reclassification succeeded in one case in 1980 (Chapter 815, Laws of 1980), and the merger option may also be pursued.

With mergers attractive to so many institutions and constituencies, the Regents can anticipate handling a greater volume of such actions during the next decade. The policy question is not whether such mergers should be encouraged but how to make certain they are viable and creative options augmenting the state's emerging market-based retrenchment strategy. Given the increased interest in mergers, New York's case-by-case approach for handling them may no longer be appropriate--or it may provide just the kind of flexibility needed to adjust the Regents' strategy.

STATE POLICIES AFFECTING MERGERS

There are seven distinct policies and practices which may impinge upon a college merger before, during, and after its consummation. Five apply to all mergers and the remaining two involve special cases: monitoring, off-campus instruction, chartering, master planning, program registration, legislative

override, and trustee replacement. The application of these policies can vary substantially, however, under the case-by-case approach now used. In general, a merger begins with an article of agreement between two boards of trustees and is consummated by either a Regents vote granting consolidation or the court-ordered assignment of assets following a dissolution. Between these come exploratory discussions with the State Education Department and counsel for the Regents. These legal events mark the beginning of an extended period during which the successor institution alters its programs and structures to adapt to its new condition (see Millett, 1976). State policy in New York affects the merger at all points in the process.

Under their monitoring policy, the Regents may suggest to a distressed institution that it seek merger. The staff also tracks the progress of a successor institution through its period of post-merger adjustment. Off-campus instruction policy involves the uses to be made of facilities acquired through merger. Unless the original institutions are within a reasonable distance of one another, one will be designated the main campus, and use of the other will then fall under a set of new regulations dictating types of services and programming for off-campus instructional units. The policy has been designed primarily to bring structure and fair competition to off-campus offerings. Its implications for post-merger academic programming and income are serious enough, however, to suggest that, if possible, an interpretation of their impact be sought in advance of a merger.

Two policies directly affect the terms of the merger: chartering (incorporation) and master planning. In a consolidation merger, two institutions petition to be rechartered as one, possibly designating a branch campus. In a

dissolution merger, the dissolving school petitions the Regents to take back its charter while the acquiring institution requests amendments appropriate to arrangements made for expansion, including, if necessary, the establishment of a branch campus. In either case, the breadth of a charter's terms is within the discretion of the Regents and can be used to enforce equity. Terms of a charter will, in all likelihood, also be affected by the manner in which the merger will alter the state's master plan for higher education. Institutions seeking major program changes must petition the Regents to amend formal institutional plans submitted as part of the master-planning process. After a review based on quality, need, and viability--during which all colleges in the region are invited to comment concerning competition--an institution's request is granted if it seems consonant with the needs of the state. Mergers between institutions which offer dissimilar degrees or with programs representing dissimilar major missions require master-plan amendments along with charter petitions. Approvals for charter changes and master-plan amendments are granted simultaneously.

Closely related to master-planning policy is the state's policy of program registration and review. An institution is permitted to offer a program by registering it with the State Education Department. Merger requires reregistration of programs to the successor institution even if no substantive changes are planned. The evolution of new programs following a merger, of course, would be subject to both master planning and program registration policies.

In addition to the policies discussed above, two other governmental practices in New York can alter the progress of a college merger. The first

is the possibility of legislative override if a merger is politically sensitive and involves the public sector or public funds. The second is a new development which provides a parallel override feature for the independent sector. It is the Mannes College decision, in which the Regents took their first action to dismiss an active board of trustees under a long-standing law allowing them to do so (New York State Education Law, §226). The law's scope is not exclusive to mergers, but in this case it effectively blocked a merger attempt. In the fall of 1978, the Mannes College of Music in New York City enrolled approximately 200 students under a mostly part-time faculty of 120. The school had a history of financial difficulties and was negotiating for merger with Manhattan School of Music under conditions of severe financial exigency. Records from the eventual hearing indicate that the Mannes board was preoccupied during this crisis trying to straighten out a legacy of managerial and financial problems, negotiate funds to meet current obligations, and finalize the merger. Eventually, a group of faculty and two trustees petitioned the Regents to dismiss the rest of the trustees and appoint a new board.

Section 226 of the New York Education Law provides in part that "the Regents may remove any trustee of a corporation created by them for misconduct, incapacity, neglect of duty, or where it appears to the satisfaction of the Regents that the corporation has failed or refuses to carry into effect its educational purposes." After an administrative hearing, a subcommittee of Regents ruled that the financial crisis and secret merger negotiations were not in themselves sources of board culpability, that there had been a number of serious problems in governance and administration at Mannes,

but that "certain critical matters" amounted to "a collective neglect of duty which [were] appalling." These matters were mainly procedural:

1. Allowing the acting president to effect major changes in the curriculum without "reasonable consideration" and "formal authorization" by the board and without faculty consultation;
2. Making "no serious effort" to fill a pending gap in the presidency, although either continuation or merger would require a chief executive officer;
3. Permitting the catalogue to advertise courses and faculty which would no longer be available.

By ruling on this basis, the subcommittee followed a philosophy that sound procedure leads to sound education, and it also avoided overruling the substantive judgments of the institution's board. The hearing's result, however, was Regents' action setting aside the existing board (including the two petitioning trustees) and rapidly appointing a new board.

The direct implications of this ruling, like the law it is based upon, are limited to New York. But in an age of litigation, the Mannes case could become part of a trend to take retrenchment issues into the courts and before administrative boards. Because petition under Section 226 is without cost, the Mannes ruling as it currently stands encourages members of academic communities to seek the radical removal of boards as a means of settling differences without allowing for the kinds of "middle ground" resolutions usually built into the legal process. Moreover, its impact will be felt primarily within the state's private sectors, since public institutions generally are chartered by statute rather than by the Regents. (If these problems

materialize and become serious, the Regents can still refine and differentiate the Mannes decision to reduce its impact. For instance, they might institute a fact-finding step to evaluate the degree of trouble an institution must face before a Section 226 hearing is allowed; Mannes could represent the least permissible level of deterioration for institutions facing closure, and higher standards of difficulty could be required for basically healthy institutions. In addition, the Regents might introduce a period of post-hearing mediation requiring that institutional procedures be followed in pursuit of an internal resolution; the Mannes case could be cited as an unusual instance where the part-time nature of performing arts faculty had vacated such normal governance practices. By thus expanding the process, the Regents could make it both more effective and less open to spurious use.)

THE EISENHOWER COLLEGE-ROCHESTER INSTITUTE OF TECHNOLOGY MERGER

On the surface, the merger of Eisenhower College with the Rochester Institute of Technology (R.I.T.) looks like an improbable combination: an urban technical institution acquiring a failing liberal arts college 60 miles into the country and at a time when many institutions are trimming their liberal arts commitments. Yet mergers of this sort may become a major means of restructuring private higher education to meet conditions of massive over-capacity in the 1980s (Chambers, 1981).

Eisenhower College was chartered in 1965 and in 1968 was designated as a national memorial to President Dwight D. Eisenhower. Its programs featured a pure version of liberal arts with a unique general education component called World Studies. Over its brief history, most of the school's capital came from federal sources. Its enrollments reached a maximum of 800 students in

1972, but fell off following a highly publicized financial crisis in 1973. Action by the state Dormitory Authority and a controversial federal grant from the sale of Eisenhower silver dollars helped the institution at that point, but the state continued to express concern over the institution's fiscal condition and suggested merger with some stronger school. No serious overtures were made during this period, since the institution hoped it could raise the endowment funds needed to remain autonomous. But when operating losses approximated \$1.5 million in 1978, the school found itself unable to meet payments on its long-term debts, and by early 1979 the trustees could see no other route but closure.

For its first 100 years, the Rochester Institute of Technology had offered non-degree courses of study preparing students for positions in local industry. Its growth from two "uplift" societies organized on the frontier had been almost exclusively by means of merger with separately established, trade-related schools, but a special feature of its curriculum was a concept of "complementary education" offering liberal arts and experiential programs to broaden a student's career preparation. After World War II, the increasing educational requirements of technology, plus competition from community colleges, prompted R.I.T. to become a degree-granting institution. By 1979, R.I.T. enrolled 14,000 students, offered degrees to the master's level in seven of its nine colleges, had a new suburban campus, and had reasonably absorbed its newest unit, the federally funded National Technical Institute for the Deaf. Planning priorities then included a need for more space to accommodate current programs and meet the needs of a cohort of students made deaf through rubella epidemics. Other concerns included a need for national

visibility, a desire to improve managerial skills, and a wish to maintain the vitality which rapid growth and change had brought to the Institute.

Ten years ago the combination of such opposites—Eisenhower College and R.I.T.—would not have suggested a formula for success. It may be typical of mergers in the retrenchment era, however, as the effects of demographics devolve unevenly across the academic community. Closure seems inevitable for numbers of young, rural, and debt-ridden liberal arts schools. On the other hand, some specialized institutions will continue to grow—most notably, urban technical ones serving the career needs of older "baby boom" students now caught in an employment squeeze. For such schools, acquiring ready-built campuses in regions underserved by technical programs may be an attractive form of growth, especially if the price is right.

Merger discussions were initiated privately over lunch by a trustee who happened to sit on the boards of both Eisenhower and R.I.T. At that point, Eisenhower's position was sufficiently precarious so that any unfavorable publicity probably would have brought it to crisis. R.I.T.'s immediate problem, then, was to maintain the option to decline by recognizing the need for secrecy. This meant studying the proposition with little information and with great speed. The R.I.T. board's prime concern was whether or not such an acquisition could be made complementary to its academic program and whether it could be accomplished without substantial risk. The Eisenhower trustees were concerned that the occupants of their campus be cared for and that the school continue to be a suitable memorial to President Eisenhower. R.I.T. concluded that a suitable academic program could be launched over a three-year period during which R.I.T. would sustain operating losses on the campus.

It was also possible to negotiate with Eisenhower's major creditors for an extended moratorium on principal and interest, low interest rates, and no extension of claims against other assets of the Institute. R.I.T. hoped that the campus could be made 70 percent self-sustaining within five years and that underdeveloped endowment potential might be tapped for income to cover the remaining 30 percent. If this could be done, R.I.T. would have diversified its program with a nationally visible unit and acquired a \$50-million plant for \$9.2 million in debts plus temporary operating losses, at relatively little risk.

It became obvious during this early period of negotiation that two factors would be essential to success--a favorable legal strategy and a successful personnel strategy. R.I.T. had to use legal techniques which would allow it to bring to bear the full weight of its bargaining position while protecting its current assets. The dissolution merger route would provide this but would also require an extensive and complicated negotiation process. Prior to announcing the merger it was agreed that Eisenhower students would continue in their current programs as far as it was financially feasible for them to do so; that faculty would receive one-year contracts (staff and administrators less) while academic programs complementary to R.I.T.'s mission were being replanned; and that the campus would be maintained with a unique identity including, as far as possible, the World Studies curriculum. Following the initial announcement of these terms, the merger had to gain approval from the state through the preparation and processing of charter and master-planning amendment petitions. (See Table 1, Approval Process for College Merger in New York.) While these petitions were being processed, negotiations continued

Table 1

APPROVAL PROCESS FOR COLLEGE MERGER IN NEW YORK

Consolidation Option	Dissolution/Acquisition Option
1. Negotiate two-board agreement for consolidation.	1. Negotiate two-board agreement for dissolution/acquisition.
2. Call special board meeting and approve agreement by three-quarters majority, using absentee votes if needed.	2. In meeting for this purpose, the board of the dissolving institution votes dissolution by a three-quarters majority, using absentee votes if needed.
3. Petition Regents with agreement and votes attached, giving background and rationale for merger and audits if necessary.	3. Dissolving institution prepares statement that all taxes owed have been or will be paid.
4. Petition reviewed by counsel to Regents.	4. Audit acquiring institution and negotiate with any debtors holding relevant reserve clauses.
5. Petition reviewed by SED, investigated, augmented if necessary (master-plan amendment process may be required), and reported to the Regents.	5. Audit dissolving institution and examine for assets and liabilities to be assumed.
6. All papers to Regents' committee 10 days prior to their meeting.	6. Examine trust funds for necessary renegotiation or <u>ex parte</u> proceedings prior to transfer.
7. Regents or committee approval concludes legal merger (\$50 fee) by forming one corporation with all assets and obligations of the prior two.	7. Prepare stock transfers for portfolio of dissolving school.
	8. Renegotiate all grants and contracts which are being continued.
	9. Renegotiate trust indentures and mortgages for all long-term debt to be assumed.
	10. Prepare deed transfers and bills of sale for all property to be transferred.
	11. Prepare explicit statements for all liabilities and obligations to be assumed (including current students, faculties, board composition).
	12. Petition Regents for acquiring institution's necessary charter amendments and master-plan amendments (degrees offered, major missions, branch campus); attach basic merger agreement.
	13. Papers due to Regents' committee 10 days before next meeting of Regents.
	14. Petitions reviewed by counsel to Regents.
	15. Petitions reviewed by SED, investigated, augmented if necessary (master-plan amendment process used as needed).
	16. Regents simultaneously approve petitions of dissolution and amendment.
	17. Publish notice to application to court over four consecutive weeks prior to court date.
	18. Petition local state court for disposition of assets; include audit and proof of public notices.
	19. Send copy to Regents and state's attorney general.
	20. Regents and dissolving board send recommendation to court regarding disposition.
	21. Acquiring board petitions to state court for desired disposition, including all agreements, statements, and audits.
	22. Court disposition concludes merger.

among the concerned parties in preparation for the court-ordered distribution of assets that would follow Eisenhower's dissolution. At this point, the Eisenhower faculty stated their concerns through an AAUP representative, but R.I.T. did not wish to offer tenure status to faculty before having the opportunity to plan programs which they would teach; under the dissolution route it had no obligation to do so.

Despite R.I.T.'s legal strategy and excellent bargaining position, the final merger arrangement contains restrictions which could prove costly, the most severe of which grew out of the Regents' consultations with other institutions concerning R.I.T.'s master-plan amendment to use Eisenhower as a branch campus. Colleges near the Eisenhower campus expressed concern over having R.I.T.'s programs move into their geographical sphere; those in the Rochester area felt it would be unfair to introduce yet another set of liberal arts degrees there. In response to these concerns the Regents restricted R.I.T.'s charter so that B.A. degrees can be offered only at the Eisenhower site, and R.I.T.'s other degrees may not be offered there.

The very complexity of the dissolution route also imposed certain penalties. In negotiating and coordinating the approvals of so many parties, inevitably there were instances of error and missed communication. Most costly was a delay involving the state's charter and master-plan procedures. Despite efforts on all sides to expedite the process on an emergency basis, an official hearing before the Regents had to be postponed from September of 1979 into October. This delay increased both the real and risk costs of the merger by extending the period of stress at the Eisenhower campus, by forcing R.I.T. to underwrite an academic year without any legal safeguards, and by reopening

negotiations with major creditors—which resulted in less favorable terms. Despite these drawbacks, the bargaining flexibility provided by the dissolution process did provide one of the major elements necessary for the merger to take place.

One further consideration was very much in the minds of those trying to arrange the merger. For young persons developing loyalties to their school and for dedicated teachers and administrators, a prolonged period of negotiation would cause what one R.I.T. administrator characterized as "a tremendous expense of the spirit." These costs and their long-run effects on an institution were not ignored; it became of utmost importance to stabilize the situation quickly and humanely.

R.I.T.'s administrators chose to deal with the Eisenhower faculty with almost flat-footed honesty, making changes by fiat but promising nothing more than they had in mind and sharing with them the evolution of their thoughts as they worked through the process of reshaping the college. An academic planning committee was established with equal representation from both of the original institutions and with large enough size so that one out of every five from the Eisenhower faculty could participate. The committee's charge was kept broad—design a set of programs which would draw upon the strengths of the original schools and support themselves. In a remarkable three-month period of study, consultation, and debate, this committee reduced 32 majors to 9 "career-oriented liberal arts" concentrations, with a World Studies core and elective job skill components (Plough, 1980, and R.I.T., 1979).

The stabilization strategy can be considered a success—Eisenhower's 1979-80 academic year ended with a creative new academic plan, zero faculty

attrition, and 30 more students on campus than had been anticipated. Part of this success can be attributed to the poor job market for liberal arts faculty, but it is more probably due to (a) extensive involvement of the faculty in the academic planning process, (b) clear and visible concern on the part of R.I.T.'s top administrators, (c) an attitude of honest effort, and (d) the courage and flexibility of faculty who had for years been adjusting the Eisenhower program in the face of financial failure.

THE TIME COSTS OF STATE POLICY

Since a financial exigency merger generally takes place precisely because one set of programs has proven itself nonviable, change in academic programming is inevitable. Given the need to develop a different and, in this instance, a separate set of academic programs for the new campus, and given the high fixed cost of maintaining the campus while doing so, the question is: How long will it take to mount, market, and fill new programs, and what kind of intervening losses will the institution suffer as older programs are phased out and their students leave? The essence of the problem is time, so it is the temporal impact of state policy that is examined here.

The time problem develops in terms of higher education's recruiting calendar. In general, the most highly motivated and qualified students can be recruited as high school juniors during the spring "college fair" season. A second group can be recruited in the fall of their senior year, with late-comers taking an interest only as graduation approaches and passes. To recruit from all three groups, a program must be publicized a full year and a half before a school can expect to have a freshman class to occupy it, or at least a year ahead of time for a smaller or less motivated class. Three additional

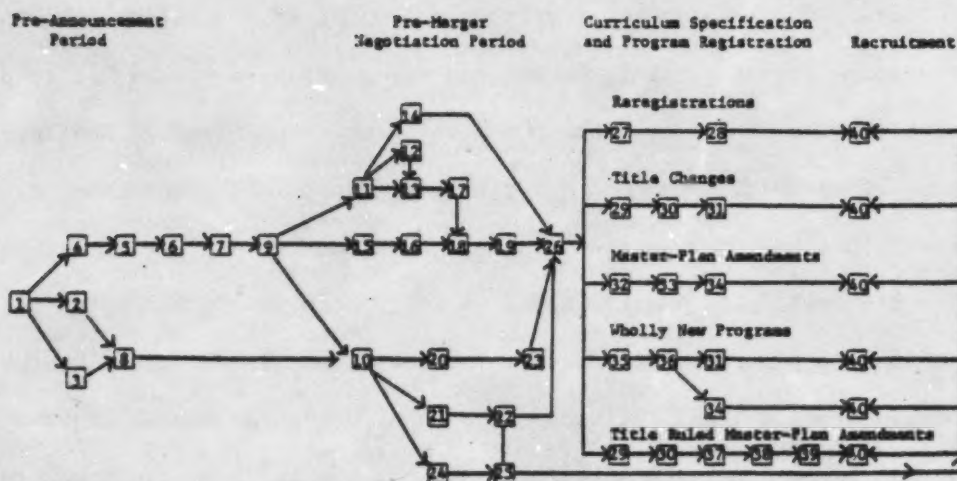
years are required before cohorts of students will fill all four years of the program. (Transfer students, nontraditional students, part-timers, etc. can change this somewhat but, for simplicity's sake, are omitted from this discussion.) This calendar is inexorable. The time period leading up to actual recruitment is also lengthy, but more manageable. Before mounting a new program, a school generally uses academic governance procedures to determine what programs to offer, then specifies curriculum, and, in New York, registers it with the state. For a stable campus this poses no special problems, since the changes are "rolling" ones made to replace or augment existing programs. For the financial exigency merger with its potential gap between student populations, however, the long lead time required by the process can present a major financial obstacle. For the amount of program change undertaken at Eisenhower, for instance, the three months taken for program specification can be considered a minimum. Any delays in curriculum specification and program registration will expand this time, as will delays caused by starting the process at some awkward point on the recruiting calendar. In the Eisenhower case, a year's delay in recruiting a class cost over \$7 million in forgone income. Thus the order in which programs can be put in place and the amounts of time required for curriculum specification and registration represent crucial planning variables in a merger of this sort.

In New York there are several steps which must take place before registering the various programs (see Figure 1). Program specification can begin before a merger is announced, but faculty committees cannot be appointed while secrecy is necessary. Faculty planning must begin immediately following the announcement, however, since charter and master-plan amendments will

Figure 1

ACADEMIC PROGRAM APPROVALS FOR A DISSOLUTION MERGER
IN NEW YORK

Network of Key Events



Events

- | | |
|---|--|
| 1 Merger proposition | 20 Academic planning completed |
| 2 Academic possibilities studied | 21 Sequence set for mounting new programs and phasing out old ones |
| 3 Confidential consultation with state officials | 22 Recruitment halted for programs phased out |
| 4 Other preliminary studies done | 23 Academic planning reviewed internally and approved |
| 5 Basic merger agreement negotiated | 24 Admission staff informed of new programs |
| 6 Regents from region informed | 25 Separate recruiting materials prepared for each program |
| 7 Regional planning group/consortia informed | 26 Registration process begun |
| 8 Charge prepared for academic planning committee | 27 Reregistration of programs to be kept |
| 9 Merger announced | 28 Reregistration approved by state |
| 10 Academic planning committee appointed | 29 Title change program curriculum developed |
| 11 Conference with counsel to Regents and SED officials re charter and master-plan amendment requirements | 30 Title change submitted |
| 12 Enabling charter petitions submitted | 31 Title change approved by state |
| 13 Enabling master-plan amendment petitions submitted | 32 Master-plan amendment program curriculum developed |
| 14 State contacts maintained through courtesy calls | 33 Master-plan amendment program submitted |
| 15 Court date set for asset transfer | 34 Master-plan amendment program approved |
| 16 Negotiations with debtors, personnel, etc. | 35 Wholly new program curriculum developed |
| 17 Regents' simultaneous approval of charter and master-plan changes | 36 Wholly new program submitted as title change or master-plan amendment |
| 18 Negotiated legal documents prepared and checked | 37 Title change submission ruled a master-plan amendment |
| 19 Court transfer of assets | 38 Resubmitted to state as master-plan amendment |
| | 39 Approved as master-plan amendment |
| | 40 Recruitment begins upon approval |

interactively require and dictate basic academic planning information. Legal consummation of a merger opens the way to begin registering programs. In the Eisenhower case, despite efforts by both the state and the institutions, these legal negotiations took two months longer than academic planning did. Suggestions to shorten the legal stage are:

- Frequent and early use of telephone and conference;
- Reaching a clear understanding of all state requirements;
- Use of a project director in the institution to keep track of events at or near the "critical path," including coordination with legal counsel for both institutions.

The time required for curriculum specification and program registration depends upon the degree of change involved in each program. Where reregistration is sought without basic change, the process takes about one month. Submissions involving minor curricular changes and changes of title take three months. Master-plan amendments normally take about six months and must be submitted by February 1st for offerings to be available by the following fall. Suggestions to shorten the curriculum specification and program registration stages include:

- Assigning faculty committees to curriculum development for each program at the earliest date possible and on a priority basis;
- Transferring personnel and effort to the planning and coordination task and hiring outside assistance as needed;
- Conferring early with the State Education Department on how each program will be received and how it should be submitted;
- Negotiating, if possible, for a holistic definition of the merger to allow broad changes to be processed in a routine and foreshortened manner.

POLICY RECOMMENDATIONS

The foregoing suggestions are intended to help institutions negotiate financial exigency mergers in New York state. The recommendations which follow are also specific to New York but have implications for other states considering how best to prepare for the changes ahead.

The possibility of wide variations in the application of New York's policies to merger situations raises the question of whether or not some standard approach would be preferable to the case-by-case method now in use. The main problem involved in standardizing merger policy would be technical—mergers represent a multiplication of institutional complexity with problems so idiosyncratic that each, of necessity, must be hand-tailored by the institutions and the state. A general policy toward mergers would be possible only if it addressed procedural rather than substantive problems. The procedural recommendations made here are intended to enhance the merger option in its usefulness to the state and in its attractiveness to institutions:

- New York should continue its policy of not requiring formal notice to the state prior to a merger, because of necessarily private negotiations;
- New York should retain the hand-tailored approach to college mergers but should develop in its planning division merger experts who can broker mergers, provide policy information to institutions, negotiate general understandings with them to speed the process, and expedite their post-merger submissions.

In addition, the state's separate policies could be adjusted to improve the merger option:

- The state's monitoring policy could be expanded to provide information regarding dissolution/acquisition mergers and regional lists of potential acquirers.
- Chartering policy could be used to enforce fair competition and equity in acquisition situations.
- The master-plan amendment process could be shortened and enhanced by use of Regents Regional Advisory Boards as forums for debates over competition, rather than making individual submissions to each regional college.
- Because delays represent prohibitively high costs when previous programs have been discontinued, program registration for mergers should include appropriate time guarantees for each kind of submission regardless of any supplementary information required by the state.
- Because a branch campus created by a merger is a definitional anomaly involving obligations to an existing campus, the new rules for off-campus instruction should be revised to allow for a period of post-merger experimentation.
- The Regents should refine the procedures and definitions for Section 226 (Mannes) proceedings.

These suggestions are intended to decrease the time, information, and risk requirements of mergers in order to make them a real alternative to closure. This, in turn, should help preserve the state's balance of public and independent institutions, since the independent sector is the one more likely to retrench through closure. Maintaining a healthfully competitive variety of institutions is fundamental to the Regents' apparent market-based

retrenchment strategy. If the Regents are to pursue such a strategy, they need to insure that market discipline affects all institutions with roughly equal weight. Currently, legislative protection is given to public institutions and to certain favored independent ones. This is not to imply that the legislature wishes to control the system of higher education in the state; more likely, the legislators would welcome some means for passing tough retrenchment questions into the hands of the Regents. The question is how, given their limited legal and political powers, the Regents can insure that retrenchment does occur in the public sector and how they can minimize ad hoc bailouts for independent schools.

One method which would draw little attention politically would be to make the criteria for program registration and review more stringent, thereby forcing retrenchment on the basis of quality, need, and financial viability. Standards which now require a proposed new career program to demonstrate that it is needed could be applied also to proposals for nonprofessional programs; the technical problem is to find suitable ways to judge demand a priori. As a second prong, the state could make more stringent its review of existing programs. There is evidence that New York is, in fact, moving in this direction. Under newly codified procedures for program deregistration, the State Education Department has opened the way for a large-scale evaluative effort. Moreover, in their 1980 recommendations to the legislature, the Regents indicated that financial criteria will carry greater weight in this review process.

This approach has excellent potential. The depth to which the policy would cut into the system could be controlled flexibly but not arbitrarily. In addition, such a policy would encourage institutions to reshape themselves

toward their unique strengths. Through the Moore decision (see page 3), the way is clear for such a policy to devolve evenly on all sectors. Also, legislators would find it difficult to pass a series of ad hoc bills to save programs expertly labeled "poor quality." Despite its potential, this approach may not overcome imbalances created in the past, however. Where unions have kept public sector salaries high, an even-handed fiscal and quality review might inadvertently decimate the independent sector. In that case, the Regents would weaken the competitive variety of the system and still be forced into a more frontal approach to the problem of retrenchment in the public sector.

The possibility of public sector retrenchment in New York is restrained by the limited authority of the Regents. On the one hand, the Regents must avoid usurping the authority of the public sector's own boards; on the other hand, they must organize a legitimate coalition for any broad legislative recommendations, or see their plans defeated. A mechanism suited to this kind of situation is the convening of a "blue-ribbon" representative panel charged with studying how the public sector could retrench--by as much as one-third, if necessary. The work of such a panel could be supported by State Education Department staff. If the panel's report proved satisfactory, the recommendations could be sent to the legislature as a legitimate sector-designed package. As part of its charge, the panel could consider the following suggestions to increase the usefulness of mergers as a reorganizational tool:

- Without designating sites, the panel might consider whether or not the public system could be redesigned into clusters composed of main campuses with accompanying branches, extension centers, and exterior sites, along with the enabling legislation which such reorganization would require.

- The panel could consider ways and means for public institutions to revert to independent status.
- After designating a limited list of functions which would qualify, the panel could consider ways and means for making essential units of independent institutions into publicly supported statutory colleges.
- Any plan would have to address its all-sector impact and include an estimate of effects on long-term debt service.

Because states differ so greatly in their higher education governance structure and in their education laws, few of the foregoing specific recommendations would be applicable to other settings. They are suggestive in a general way, however, for policy debates taking place elsewhere. Perhaps one of the most difficult problems illustrated by the situation in New York is the need to design a system that is sufficiently and evenly insulated from purely political solutions. New York also provides insight into the general strengths, weaknesses, and workability of a market-based strategy for reaching a scaled-down future.

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